

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

KENNETH MCGUIRE and DAVID  
WILCZYNSKI, On Behalf of Themselves and  
All Others Similarly Situated,

## Plaintiffs,

vs.

DENDREON CORPORATION, et al.

## Defendants.

Case No. C07-800

## **CLASS ACTION**

## **ORDER ON MOTION FOR CLASS CERTIFICATION**

This matter is the named Plaintiffs' motion for class certification. This Court, having received and reviewed

1. Plaintiffs' Motion for Class Certification (Dkt. No. 137)
2. Defendants' Opposition to Plaintiffs' Motion for Class Certification (Dkt. No. 151)
3. Plaintiffs' Reply in Support of Plaintiffs' Motion for Class Certification (Dkt. No. 156)

and all attached declarations and exhibits, makes the following ruling:

1 IT IS HEREBY ORDERED that plaintiffs' motion is GRANTED; a class will be  
 2 certified in this matter as follows:

3 A class of persons and entities who purchased the common stock of Dendreon  
 4 Corporation between March 29, 2007 and May 8, 2007, both dates inclusive  
 5 (excluding the defendants, the officers and directors of Dendreon, members of  
 6 their immediate families, and the heirs, successors or assigns of any of the  
 7 foregoing).

8 A further subclass consisting of persons and entities who purchased the common  
 9 stock of Dendreon Corporation on April 2, 2007 (excluding the defendants, the  
 10 officers and directors of Dendreon, members of their immediate families, and the  
 11 heirs, successors or assigns of any of the foregoing).

12 IT IS FURTHER ORDERED that Kenneth McGuire and David Wilczynski are appointed  
 13 as the Class representatives, David Wilczynski is appointed the Subclass representative, and their  
 14 counsel of record – Susman Godfrey L.L.P – is appointed as Class counsel.

15 **I. BACKGROUND**

16 This Court appointed McGuire as the lead plaintiff in this action. (Dkt. No. 40 at 9.)  
 17 McGuire and Wilczynski have filed a Third Amended Complaint, which is the operative  
 18 complaint at this time. (Dkt. No. 118.)

19 The complaint alleges that the defendants misrepresented the results of a United States  
 20 Food and Drug Administration (“FDA”) inspection of Dendreon’s manufacturing facilities, and  
 21 that Gold engaged in insider trading when he sold Dendreon stock with full knowledge of the  
 22 results of the inspection and before the results were publicly disclosed. (Id. at 2-7.)

23 Dendreon is a biotechnology company developing Provenge, a cancer treatment product  
 24 with a one-billion dollar potential market. (Id. at 2.) In mid-February 2007, the FDA conducted  
 25 an inspection of Dendreon’s manufacturing facilities. (Id. at 3.) After the inspection, the FDA  
 26 issued Dendreon an Inspectional Observations Report on Form 483 detailing multiple  
 “significant objectionable conditions.” (Id.) Dendreon could not obtain FDA approval of  
 Provenge until the “significant objectionable conditions” were resolved. (Id.)

1       On March 29, 2007, during a conference call with securities analysts and investors, one  
 2 analyst asked Gold whether Dendreon's facilities "passed muster." (Id. at 4.) As Gold began to  
 3 respond, Urdal interrupted and stated that "we hosted a good inspection." (Id. at 4, 7.) The next  
 4 day, Dendreon common stock experienced heavy trading volume and its price increased 343%.  
 5 (Id. at 5.) Four days later, Gold sold 24% of his holdings of Dendreon stock for approximately  
 6 \$2.7 million. (Id.)

7       On May 8, 2007, the FDA rejected Dendreon's application to approve Provenge, citing  
 8 the inspection issues as one of the two reasons for its decision. (Id.) The market price of  
 9 Dendreon common stock dropped from \$17.74 to \$6.33 per share that day. (Id.) On May 10,  
 10 2007, during a conference call with securities analysts and investors, defendants acknowledged  
 11 for the first time that the Form 483 had been issued in February, it identified multiple  
 12 "significant objectionable conditions," and the FDA had cited those same issues in declining to  
 13 approve Provenge. (Id.)

14       Plaintiffs seek certification of a class with a class period beginning on March 29, 2007,  
 15 the date of the first conference call, running through May 8, 2007, the day just before the  
 16 disclosure of the FDA's rejection of Dendreon's application to approve Provenge. Both  
 17 McGuire and Wilczynski purchased shares of Dendreon common stock during the Class Period.  
 18 (Id. at 8.) McGuire and Wilczynski contend that Defendants' actions violated federal securities  
 19 laws and that they and others who purchased Dendreon stock during the Class Period were  
 20 injured and suffered damages as a result of these violations. Plaintiffs also seek certification of a  
 21 subclass consisting of people who purchased Dendreon stock on April 2, 2007, the date Gold  
 22 sold his shares. Wilczynski purchased 5,200 shares of Dendreon stock on that date. (Id. at 38.)

23 **II. ANALYSIS**

24 **A. Legal Standards**

25       This Court is given discretion over whether to certify a class. Yokoyama v. Midland Nat.  
 26 Life Ins. Co., 594 F.3d 1087, 1090 (9th Cir. 2010). This Court may certify a class only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class

Rodriguez v. Hayes, 591 F.3d 1105, 1122 (9th Cir. 2010) (quoting Fed. R. Civ. P. 23(a)). The party seeking certification must also fall into one of three categories in Rule 23(b). Id. Plaintiffs here seek certification under Rule 23(b)(3) which provides that this Court must find that common questions of law or fact predominate and the class action is superior to other methods of adjudication. Fed. R. Civ. P. 23(b)(3). This Court must conduct a “rigorous analysis” to determine if the prerequisites of 23(a) are satisfied. Chamberlan v. Ford Motor Co., 402 F.3d 952, 961 (9th Cir. 2005) (per curiam).

The Ninth Circuit has recently clarified the standards applicable to class certification.

See *Dukes v. Wal-Mart Stores, Inc.*, \_\_\_ F.3d \_\_\_, 2010 WL 1644259 (9th Cir. 2010) (en banc).

The standard is:

First, when considering class certification under Rule 23 district courts are not only at liberty to, but must, perform a rigorous analysis to ensure that the prerequisites of Rule 23 have been satisfied, and this analysis will often, though not always, require looking behind the pleadings to issues overlapping with the merits of the underlying claims. It is important to note that the district court is not bound by these determinations as the litigation progresses. Second, district courts may not analyze any portion of the merits of a claim that do not overlap with the Rule 23 requirements. Relatedly, a district court performs this analysis for the purpose of determining that each of the Rule 23 requirements has been satisfied. Third, courts must keep in mind that different parts of Rule 23 require different inquiries. For example, what must be satisfied for the commonality inquiry under Rule 23(a)(2) is that plaintiffs establish common *questions* of law and fact, and answering those questions is the purpose of the merits inquiry, which can be addressed at trial and at summary judgment. Fourth, district courts retain wide discretion in class certification decisions, including the ability to cut off discovery to avoid a mini-trial on the merits at the certification stage.

*Id.* at \*16. Notably, the Ninth Circuit rejected the dissent’s proffered “significant proof” standard for proving discrimination claims and accepted that plaintiffs need merely to properly allege their discriminatory policy claim. *Id.* at \*17-18.

1                   **B. Class Certification**

2                   **1. Rule 23(a) requirements**

3                   Defendants do not contest that Plaintiffs' proposed class satisfies the requirements for  
 4 numerosity and commonality, nor do they contest that Plaintiff McGuire meets the standards for  
 5 typicality and adequacy as the class representative. The Court agrees: Plaintiffs' class as  
 6 proposed could encompass thousands of members (making individual joinder in a single lawsuit  
 7 impractical) and numerous questions of law and fact are common to the Class and Subclass. The  
 8 Court has previously found McGuire's claims typical of the Class and affirmed his adequacy as a  
 9 class representative. Dkt. No. 40. Defendants' challenge to Wilczynski's qualifications is  
 10 discussed below in Section C.

11                   **2. Rule 23(b)(3) requirements**

12                   The party seeking certification must also qualify under one or more of the three  
 13 categories in Rule 23(b). Plaintiffs here seek certification under Rule 23(b)(3) which provides  
 14 that this Court must find that common questions of law or fact predominate and the class action  
 15 is superior to other methods of adjudication. Fed. R. Civ. P. 23(b)(3). Defendants do not  
 16 dispute that common questions predominate and this Court is satisfied that they.

17                   Plaintiffs also allege that a class action is the superior method of adjudication because the  
 18 class size is so large and damages may be relatively small for many class members, making  
 19 individual law suits impractical. Plaintiffs further allege that a class action will be more  
 20 economical, efficient, and fair in addressing all the claims at once in a uniform matter.  
 21 Defendant do not dispute that a class action would be superior and this Court is satisfied that it  
 22 would be.

23                   **C. Subclass Certification**

24                   Although Dendreon does not contest that the certification of the class overall is  
 25 appropriate, it does contest the certification of the subclass of stock purchasers who bought their  
 26 stock on April 2, 2007, the date Gold sold his shares, and the inclusion of in-and-out traders in

1 the overall class. In regards to the subclass, Defendants contest the typicality of Wilczynski's  
 2 claim and his adequacy as the subclass representative.

3 **1. Typicality**

4 Dendreon argues first that Wilczynski's claim is not typical because he is subject to  
 5 unique defenses as revealed by his deposition testimony. The Ninth Circuit has held that "[t]he  
 6 purpose of the typicality requirement is to assure that the interest of the named representative  
 7 aligns with the interests of the class." Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir.  
 8 1992). The "test of typicality is whether other members have the same or similar injury, whether  
 9 the action is based on conduct which is not unique to the named plaintiffs, and whether other  
 10 class members have been injured by the same course of conduct." Id. (quotation marks omitted).  
 11 A motion for class certification should not be granted if "there is a danger that absent class  
 12 members will suffer if their representative is preoccupied with defenses unique to it." Id.  
 13 (quotation marks omitted).

14 Dendreon argues that Wilczynski's deposition reveals several unique defenses.  
 15 Dendreon points to Wilczynski's belief that the stock's price was suppressed by short sellers, and  
 16 continues to be, as an argument that the price of Dendreon stock was not purchased at an inflated  
 17 price. (Dkt. No. 157-1 at 14-16, Dkt. No. 152-1 at 6-8.) Dendreon also argues that Wilczynski's  
 18 belief that the market is rigged by short sellers demonstrates he did not rely on the integrity of  
 19 the market. (Dkt. No. 152-1 at 47.) Dendreon further points to Wilczynski's testimony at his  
 20 deposition that his interrogatory answer that he "relied upon the integrity of the market" meant  
 21 he relied upon the integrity of the cancer treatment market and not the stock market. (Id. at 55.)  
 22 Dendreon finally points to Wilczynski's message board comments regarding the FDA's  
 23 culpability in causing the stock price to fall and Wilczynski's testimony at his deposition that he  
 24 thought Provenge still should have been approved to argue that Dendreon did not cause  
 25 Wilczynski's losses. (Id. at 16-17, 35-38.) This Court addresses each argument in turn.  
 26

1       First, Dendreon's argument about Wilczynski's beliefs about short-sellers appears to be a  
 2 non-reliance defense. Generally, a purchaser of stock is entitled to a presumption that she relied  
 3 on the integrity of the market. Basic Inc. v. Levinson, 485 U.S. 224, 247 (1988). However, a  
 4 defendant can "rebut proof of the elements giving rise to the presumption." Id. at 248. "Any  
 5 showing that severs the link between the alleged misrepresentation and either the price received  
 6 (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut  
 7 the presumption of reliance." Id. However, the Ninth Circuit has emphasized that "the defense  
 8 of non-reliance is not a basis for denial of class certification." Hanon, 976 F.2d at 509. This  
 9 Court, however, is "at liberty to consider evidence which goes to the requirements of Rule 23  
 10 even though the evidence may also relate to the underlying merits of the case." Id. (citation  
 11 omitted).

12       Dendreon's argument about Wilczynski's beliefs about short-sellers demonstrates a  
 13 fundamental misunderstanding about how the stock market functions. Wilczynski's belief about  
 14 short-sellers simply indicates that he (a "long-seller") believed the stock was undervalued, not  
 15 that he did not rely on Dendreon's misrepresentations. Investors who sell short (i.e., sell assets  
 16 such as securities with the intention of buying them back at a later date) realize their profit only  
 17 if there is a decline in the value of the asset in the interim; in other words, if the assets were over-  
 18 valued. Investors "going long," like Wilczynski, do so in the belief that the stock is undervalued  
 19 by the market and that they will profit when the price of the security goes up.

20       The price per share reflects all the publicly available information and the beliefs of both  
 21 investors like Wilczynski, who believe the stock is undervalued, and short-sellers, who believe  
 22 the stock is overvalued. Nothing about Wilczynski's beliefs renders him atypical or  
 23 demonstrates that Dendreon has a defense of non-reliance. If anything, Wilczynski's beliefs  
 24 demonstrate that he relied heavily on Dendreon's alleged misrepresentations (which tended to  
 25 drive the value of their stock upward) to combat the effect the short-sellers had on the price of  
 26 the stock.

1 Dendreon's second argument also appears to relate to a defense of non-reliance.  
2 Dendreon argues that Wilczynski's belief that the market is "rigged" and Wilczynski's  
3 clarification of his interrogatory response show that he did not rely on the integrity of the stock  
4 market. These allegations do not demonstrate Wilczynski's non-reliance on the integrity of the  
5 market or the misrepresentations. Defendants' analysis of Wilczynski's beliefs ignores the  
6 Supreme Court's discussion about efficient markets and its comment that "it is hard to imagine  
7 that there ever is a buyer or seller who does not rely on market integrity. Who would knowingly  
8 roll the dice in a crooked crap game?" Basic Inc., 485 U.S. at 246. If Wilczynski truly believed  
9 the market was rigged such that short sellers could manipulate the market at their will, there was  
10 no reason for him to buy Dendreon stock. Wilczynski was, instead, relying on the market to act  
11 efficiently when he hoped that the FDA would approve Provence. This is reflected in the very  
12 next sentence of his "rigged" post where he wrote the only way to defeat short-sellers is to  
13 "hold" the stock. His interrogatory response was explained in the context of his beliefs about  
14 short sellers, and Dendreon's analysis of those beliefs has been addressed in the preceding  
15 paragraph. The Court finds that Wilczynski relied on the integrity of the market in purchasing  
16 Dendreon stock, and that his beliefs about the way the stock market functions do not render him  
17 an atypical representative.

18 Dendreon's third argument relates to Wilczynski's message board posts indicating that he  
19 blamed the FDA for Dendreon's stock drop and his testimony that he believes that Provence still  
20 should have been approved by the FDA. This argument appears to relate to Wilczynski's  
21 reliance on Dendreon's statements. Wilczynski believed the FDA should have approved the  
22 drug, and therefore its denial hurt the stock price of Dendreon, which is exactly what happened.  
23 Dendreon's alleged misstatements led Wilczynski to believe that the FDA would approve the  
24 drug. Nothing about the previous two statements is inconsistent. Furthermore, Dendreon  
25 mischaracterizes Wilczynski's statements. His belief that Provence should still have been  
26 approved is based on the Advisory Committee recommending approval, which relates to

1 efficacy, not to manufacturing issues. Even if all of Wilczynski's message board posts reflected  
 2 his beliefs, the posts do not disprove Wilczynski's reliance on the market and Dendreon's  
 3 statements.

4 Dendreon has cited no case that supports its various arguments that Wilczynski did not  
 5 rely on the integrity of the market or Dendreon's misstatements. Hanon does not support  
 6 Dendreon's point because the plaintiff's lack of reliance there was based on his "extensive  
 7 experience in prior securities litigation, his relationship with his lawyers, his practice of buying a  
 8 minimal number of shares of stock in various companies, and his uneconomical purchase of only  
 9 ten shares of stock." Hanon, 976 F.2d at 508. None of those situations are present here. See  
 10 also State of Alaska v. Suburban Propane Gas Corp., 123 F.3d 1317, 1321 (9th Cir. 1997)  
 11 (finding plaintiff atypical because its bargaining power provided it opportunities to avoid injury).  
 12 This Court finds that Mr. Wilczynski's claims are typical of the subclass as a whole.

13 **2. Adequacy**

14 Dendreon's next argument is that Wilczynski is not adequate because he is unfamiliar  
 15 with the case. The Ninth Circuit has held that an "adequate representative must have the  
 16 capacity to vigorously and conscientiously prosecute a derivative suit and to be free from  
 17 economic interests that are antagonistic to the interests of the class." Larson v. Dumke, 900 F.2d  
 18 1363, 1367 (9th Cir. 1990). One of the factors to be considered in determining adequacy is "the  
 19 plaintiff's unfamiliarity with the litigation and unwillingness to learn about the suit." Id.  
 20 (quotation marks and citation omitted).

21 Dendreon argues that Wilczynski is not adequate because he: (1) had not seen the third  
 22 amended complaint prior to a deposition (Dkt. No. 152-1 at 24); (2) did not know the judge's last  
 23 name (Id. at 43); (3) did not know if the case was in federal or state court (Id.); (4) did not know  
 24 what a subclass was (Id. at 27); (5) did not know what a class period was (Id. at 22); (6) failed to  
 25 produce some documents in response to an interrogatory (Id. at 7-8); (7) only spent 12 to 15  
 26

1 hours on the case (Id. at 55); and (8) did not understand the attorney's fee arrangement (Id. at  
2 25). None of these facts demonstrate that Wilczynski is an inadequate subclass representative.

3 The Supreme Court has held that dismissal of a class action was not warranted even when  
4 the plaintiff showed that "she did not understand the complaint at all, that she could not explain  
5 the statements made in the complaint, that she had a very small degree of knowledge as to what  
6 the lawsuit was about, that she did not know any of the defendants by name, that she did not  
7 know the nature of their alleged misconduct." Surowitz v. Hilton Hotels Corp., 383 U.S. 363,  
8 366 (1966). The Court noted that the logic of the lower court opinion would mean that a person  
9 "who is uneducated generally and illiterate in economic matters, could never under any  
10 circumstances be a plaintiff in a [] suit brought in the federal courts to protect her stock  
11 interests." Id. at 372.

12 This Court has held before that a plaintiff, in a pension plan class action, who did not  
13 know she was a participant in the plan, did not know she had received a distribution from the  
14 plan, thought she was entitled to a notice of change from a different plan, and was unsure of what  
15 remedies she wanted, was an adequate plaintiff. Buus v. WaMu Pension Plan, 251 F.R.D. 578,  
16 587 (W.D. Wash. 2008). This Court noted the several "extraordinary circumstances" where a  
17 plaintiff was particularly inadequate, mostly involving plaintiffs who appeared to be buying  
18 lawsuits. Id. None of the extraordinary circumstances appear here. If anything, Wilczynski has  
19 demonstrated that he has a good understanding of the lawsuit and his role as a subclass  
20 representative. He has read the original, first amended, and second amended complaint, he  
21 understands he has a fiduciary duty to represent the class, he has gathered documents in response  
22 to interrogatories, and is willing to spend as much time as is necessary to see the litigation  
23 through. (Dkt. No. 157-1 at 8, 38-40, 42-43, 53-54, 79-80, 115.) Dendreon's counsel also fails

24

25

26

1 to recognize that Wilczynski's response during questioning about attorney's fees was a joke.<sup>1</sup>  
 2 (Dkt. No. 152-1 at 25.) This Court finds that Wilczynski is an adequate subclass representative.

3 A finding that Wilczynski is an adequate subclass representative comports with the  
 4 decisions of other courts. In Moeller v. Taco Bell Corp., the district court noted that the  
 5 "threshold of knowledge required to qualify a class representative is low; a party must be  
 6 familiar with the basic elements of her claim, and will be deemed inadequate only if she is  
 7 startlingly unfamiliar with the case." 220 F.R.D. 604, 611 (N.D. Cal. 2004) (quotation marks  
 8 and citations omitted). The district court further noted that "[i]t is not necessary that a  
 9 representative be intimately familiar with every factual and legal issue in the case; rather, it is  
 10 enough that the representative understand the gravamen of the claim." Id. (quotation marks  
 11 omitted). The plaintiffs in Moeller did not know the relevant legal standards at issue in the case.  
 12 Id. Here, while Wilczynski may not know the judge's last name or the legal terms of art, he does  
 13 know that Dendreon made misrepresentations, members of the class bought shares in reliance on  
 14 that misrepresentation, and members of the class lost money when the misrepresentation was  
 15 revealed.

16 In Gammon v. GC Services Ltd. Partnership, the plaintiff incorrectly stated that he had  
 17 never been a plaintiff in a lawsuit before, could not remember if he had reviewed the complaint,  
 18 could not respond appropriately to a question relating to whether he had participated in  
 19 discovery, incorrectly believed that his legal fees were paid for, did not know how much  
 20 damages class members would receive, and misunderstood his role as a class representative. 162  
 21 F.R.D. 313, 318-319 (N.D. Ill. 1995). Despite this, the plaintiff was found to be adequate based

---

22 <sup>1</sup> In response to a question if he knew "what percentage of damages your attorneys would get if there were damages  
 23 awarded?", Wilczynski responded:

24     A. No, I don't. Most of it.  
 25     Q. The attorneys would get most of it?  
 26     A. Right.  
 27     Q. Are you winking at me, Mr. Wilczynski?  
 (Dkt. No. 152-1 at 25.)

1 on the Supreme Court's holding in Surowitz. Here, assuming all of Dendreon's arguments are  
 2 true, Wilczynski is in a similar position – he had not reviewed the third amended complaint, he  
 3 did not respond properly to an interrogatory, he did not know what legal fee arrangements were  
 4 made, and misunderstood what a subclass was. None of these things are any worse than what the  
 5 plaintiff did not know in Gammon.

6 All the cases Dendreon cites are inapplicable in this context. Wilczynski actually  
 7 demonstrates a good amount of knowledge regarding the litigation and has reviewed numerous  
 8 documents and spent 12 to 15 hours on the case. Wilczynski also consulted with his attorneys,  
 9 did know he was a subclass representative, and demonstrated a solid grasp of the basics of the  
 10 case. His situation is nothing like the extremes detailed in the cases Dendreon cites. See also  
 11 Buus, 251 F.R.D. at 587 (addressing Welling v. Alexy, 155 F.R.D. 654 (N.D. Cal. 1994) and In  
 12 re Quarterdeck Office Systems, Inc. Securities Litigation, 1993 WL 623310 (C.D. Cal. 1993)).  
 13 Both Griffin v. GK Intelligent Sys, Inc., 196 F.R.D. 298, 302 (S.D. Tex. 2000) and Kelley v.  
 14 Mid-Am. Racing Stables, Inc., 139 F.R.D. 405, 409 (W.D. Okla. 1990) are inapposite because  
 15 they relate to plaintiffs who have completely abdicated their roles to attorneys and were sought  
 16 out specifically for the litigation. Here, Wilczynski sought the attorneys out, not the other way  
 17 around, has reviewed many of the documents, has consulted with the attorneys regarding his  
 18 interrogatories, has produced documents in response to requests, and has spent more than a  
 19 minimal amount of time supervising the litigation. He is not merely lending his name to the  
 20 litigation. Wilczynski is an adequate subclass representative.

21 The subclass is certified with Wilczynski as the subclass representative.

22 **D. In-and-out Traders**

23 Dendreon's other argument is that in-and-out traders should be excluded from the class.  
 24 In-and-out traders are investors who bought their shares during the class period but sold their  
 25 shares before the misrepresentation was revealed. The Supreme Court, reviewing a motion to  
 26 dismiss, rejected the Ninth Circuit's position that such a plaintiff in a securities fraud suit can

1 establish “loss causation” by alleging inflated purchase price due to misrepresentation. Dura  
 2 Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336, 338 (2005). The Court held that “at the moment  
 3 the transaction takes place, the plaintiff has suffered no loss; the inflated purchase payment is  
 4 offset by ownership of a share that at that instant possesses equivalent value.” Id. at 342.  
 5 Furthermore, “[w]hen the purchaser subsequently resells such shares, even at a lower price, that  
 6 lower price may reflect, not the earlier misrepresentation, but changed economic circumstances,  
 7 changed investor expectations, new industry-specific or firm-specific facts, conditions, or other  
 8 events, which taken separately or together account for some or all of that lower price.” Id. at  
 9 342-43. The Court in Dura was faced with motion to dismiss and was evaluating the adequacy  
 10 of the plaintiff’s complaint.

11 Ninth Circuit precedent has long held that in-and-out traders are appropriately included in  
 12 a class. See Wool v. Tandem Computers Inc., 818 F.2d 1433, 1437 (9th Cir. 1987), overruled on  
 13 other grounds by Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1575 (9th Cir. 1990). The  
 14 Ninth Circuit adopted the out-of-pocket rule which fixes damages as “the difference between the  
 15 purchase price and the value of the stock at the date of purchase.” The Wool court indicated that  
 16 “[b]ecause market forces are independent of corrective disclosures, an in-and-out trader, . . .,  
 17 may suffer recoverable damages under the out-of-pocket rule even in the absence of corrective  
 18 disclosures.” Id. It is unclear whether Dura’s discussion of inflated purchase price as it relates  
 19 to loss causation overturns the Ninth Circuit’s rule in Wool. Courts deciding whether in-and-out  
 20 traders should be included in classes have struggled with the question.

21 Post Dura, the Ninth Circuit has spoken on the question of loss causation but not as it  
 22 relates to in-and-out traders. In Metzler Investment GMBH v. Corinthian Colleges, Inc., the  
 23 Ninth Circuit held that a “plaintiff does not, of course, need to prove loss causation in order to  
 24 avoid dismissal; but the plaintiff must properly allege it.” 540 F.3d 1049, 1062 (9th Cir. 2008).  
 25 The Ninth Circuit, however, was addressing a motion to dismiss and not a motion for class  
 26 certification. Id.

1       The only circuit to address in-and-out traders post-Dura at the class certification phase is  
 2 the Second Circuit. In In re Flag Telecom Holdings, Ltd. Securities Litig., the Second Circuit  
 3 declined to include in-and-out traders in a class action on a motion for class certification. 574  
 4 F.3d 29, 37-41 (2d Cir. 2009). The Second Circuit concluded that in light of Dura, because  
 5 plaintiffs could not produce “sufficient evidence to demonstrate that the in-and-out traders will  
 6 even ‘conceivably’ be able to prove loss causation as a matter of law” they could not proceed in  
 7 the class. Id. at 40. The Second Circuit further indicated that the proper standard of proof was a  
 8 preponderance of the evidence and not conceivability. Id. at 39.

9       District courts in the Ninth Circuit have been in conflict with each other over whether in-  
 10 and-out traders are appropriately included. In In re Juniper Networks, Inc., Securities Litig., the  
 11 court did not include in-and-out traders because, based on Dura, the plaintiffs could not  
 12 “logically prove economic loss based on Juniper’s alleged misrepresentations.” No. C 06-04327  
 13 JW, 2009 WL 3353321 (N.D. Cal Oct. 16, 2009). However, in In re Cooper Companies Inc.  
 14 Securities Litig., the district court certified the class with in-and-out traders and rejected the loss  
 15 causation argument because it was “misplaced at the class certification stage.” 254 F.R.D. 628,  
 16 641 (C.D. Cal. 2009). The court indicated that such an argument was more appropriate at the  
 17 summary judgment phase. Id. In In re Connetics Corp. Securities Litig., in a challenge to  
 18 predominance the district court indicated that plaintiffs are not required to “prove loss causation  
 19 at class certification.” 257 F.R.D. 572, 578-79 (N.D. Cal. 2009); see also In re LDK Solar  
 20 Securities Litig., 255 F.R.D. 519, 530-31 (N.D. Cal. 2009).

21       Other district courts in other circuits dealing with the inclusion of in-and-out traders post  
 22 Dura have held that they are appropriately included in a class. In Silversman v. Motorola, Inc.,  
 23 the district court “included ‘in-and-out’ traders in the proposed class yet limited class  
 24 membership to those who suffered damage as a result of their purchase of [] stock during the  
 25 Class Period.” 259 F.R.D. 163, 171 (N.D. Ill. 2009). The district court noted that the loss  
 26 causation argument could be renewed again at summary judgment. Id. The district court in In re

1 Fed. Nat'l Mortgage Ass'n Securities, Derivative, and "ERISA" Litig., held that excluding in-  
 2 and-out traders at the class-certification stage was inappropriate "with discovery still pending"  
 3 because discovery might confirm a leakage theory. 247 F.R.D. 32, 41 (D. D.C. 2008). Another  
 4 district court did not exclude in-and-out traders because the loss argument was a "damages  
 5 issues" and did not "pose a problem to the proposed class definition." Ross v. Abercrombie &  
 6 Fitch Co., 257 F.R.D. 435, 456 (S.D. Ohio 2009).

7 Plaintiff's alleged loss as follows:

8 Defendants' course of conduct operated as a fraud on purchasers of Dendreon's  
 9 common stock, deceived the investing public regarding the likelihood and timing  
 10 of FDA approval of Provence, artificially inflated the price of Dendreon's  
 11 common stock, caused plaintiffs and the other members of the Class to purchase  
Dendreon's publicly traded securities at artificially inflated prices, and caused  
plaintiffs and members of the Class loss when both the fact and consequence of  
the concealed information was made public.

12 (Dkt. No. 118 at 31) (emphasis added). In the claims for relief, the only damages plead is that  
 13 investors purchased Dendreon stock at an inflated purchase price and would not have purchased  
 14 the stock at all if they had been aware of the fraud. (Id. at 36, 37-38, 38-39.)

15 This Court finds that in-and-out traders are appropriately included in the class at the class  
 16 certification stage. The critical issue is what level of proof is required for loss causation at the  
 17 class certification stage. This Court finds that Dura only relates to how loss causation needs to  
 18 be pled in the complaint. Dura does not affect the class definition at the class certification stage.  
 19 The Second Circuit's reasoning places too great of a burden on the plaintiffs at the class  
 20 certification stage by forcing them to prove by a "preponderance of the evidence" that they  
 21 suffered a loss before discovery has even taken place. Given the Ninth Circuit's on-point Wool  
 22 decision and its recent decision in Dukes rejecting the "significant proof" standard, this Court  
 23 will allow in-and-out traders to remain in the class. In-and-out traders could prove that they  
 24 suffered a loss when they sold their shares because they only purchased the stock due to the  
 25 misrepresentation.

26 As the plaintiffs and the Eastern District of Pennsylvania noted:

1 Due to the procedural posture of the case- *i.e.*, a Rule 12(b)(6) motion- *Dura*  
 2 *Pharmaceuticals* was focused merely on the sufficiency of the plaintiff's initial  
 3 pleadings, and does not address methodologies for quantifying economic loss.  
 4 The parties' extensive briefing in the Supreme Court included specific discussion  
 5 of Judge Sneed's out-of-pocket approach to damages . . . . However the Supreme  
 6 Court did not even mention that topic in the *Dura Pharmaceuticals* opinion.  
 7 It is difficult to conclude that *Dura Pharmaceuticals* stands for an endorsement of  
 8 any particular economic loss/damage principles of law.  
 9

10 In re Cigna Corp. Securities Litig., 459 F. Supp. 2d 338, 353-54 (E.D. Pa. 2006). However  
 11 difficult it might be for in-and-out traders to prove damages, Plaintiffs should be allowed  
 12 discovery for the development of whatever evidence they might need. The Supreme Court's  
 13 limiting statement that it "need not, and d[id] not, consider other proximate cause or loss-related  
 14 questions" shows that it probably did intend to foreclose the out-of-pocket damages measure  
 15 discussed in Wool. Dura Pharmaceuticals Inc., 544 U.S. at 346. Based on Dura's applicability  
 16 only to the motion to dismiss phase, this Court includes the in-and-out traders in the class  
 17 definition. This holding does not preclude defendants from challenging loss causation or  
 18 damages at the summary judgment phase after discovery has been conducted.

### 19 **III. CONCLUSION**

20 Plaintiffs' motion is hereby GRANTED. A class will be certified as described above.  
 21 This Court finds that Mr. Wilczynski is a typical and adequate subclass representative and  
 22 appoints him as such.

23 Dated this 27th day of May, 2010.

24  
 25  
 26

  
 27  
 28  
 29  
 30  
 31  
 32  
 33  
 34  
 35  
 36  
 37  
 38  
 39  
 40  
 41  
 42  
 43  
 44  
 45  
 46  
 47  
 48  
 49  
 50  
 51  
 52  
 53  
 54  
 55  
 56  
 57  
 58  
 59  
 60  
 61  
 62  
 63  
 64  
 65  
 66  
 67  
 68  
 69  
 70  
 71  
 72  
 73  
 74  
 75  
 76  
 77  
 78  
 79  
 80  
 81  
 82  
 83  
 84  
 85  
 86  
 87  
 88  
 89  
 90  
 91  
 92  
 93  
 94  
 95  
 96  
 97  
 98  
 99  
 100  
 101  
 102  
 103  
 104  
 105  
 106  
 107  
 108  
 109  
 110  
 111  
 112  
 113  
 114  
 115  
 116  
 117  
 118  
 119  
 120  
 121  
 122  
 123  
 124  
 125  
 126  
 127  
 128  
 129  
 130  
 131  
 132  
 133  
 134  
 135  
 136  
 137  
 138  
 139  
 140  
 141  
 142  
 143  
 144  
 145  
 146  
 147  
 148  
 149  
 150  
 151  
 152  
 153  
 154  
 155  
 156  
 157  
 158  
 159  
 160  
 161  
 162  
 163  
 164  
 165  
 166  
 167  
 168  
 169  
 170  
 171  
 172  
 173  
 174  
 175  
 176  
 177  
 178  
 179  
 180  
 181  
 182  
 183  
 184  
 185  
 186  
 187  
 188  
 189  
 190  
 191  
 192  
 193  
 194  
 195  
 196  
 197  
 198  
 199  
 200  
 201  
 202  
 203  
 204  
 205  
 206  
 207  
 208  
 209  
 210  
 211  
 212  
 213  
 214  
 215  
 216  
 217  
 218  
 219  
 220  
 221  
 222  
 223  
 224  
 225  
 226  
 227  
 228  
 229  
 230  
 231  
 232  
 233  
 234  
 235  
 236  
 237  
 238  
 239  
 240  
 241  
 242  
 243  
 244  
 245  
 246  
 247  
 248  
 249  
 250  
 251  
 252  
 253  
 254  
 255  
 256  
 257  
 258  
 259  
 260  
 261  
 262  
 263  
 264  
 265  
 266  
 267  
 268  
 269  
 270  
 271  
 272  
 273  
 274  
 275  
 276  
 277  
 278  
 279  
 280  
 281  
 282  
 283  
 284  
 285  
 286  
 287  
 288  
 289  
 290  
 291  
 292  
 293  
 294  
 295  
 296  
 297  
 298  
 299  
 300  
 301  
 302  
 303  
 304  
 305  
 306  
 307  
 308  
 309  
 310  
 311  
 312  
 313  
 314  
 315  
 316  
 317  
 318  
 319  
 320  
 321  
 322  
 323  
 324  
 325  
 326  
 327  
 328  
 329  
 330  
 331  
 332  
 333  
 334  
 335  
 336  
 337  
 338  
 339  
 340  
 341  
 342  
 343  
 344  
 345  
 346  
 347  
 348  
 349  
 350  
 351  
 352  
 353  
 354  
 355  
 356  
 357  
 358  
 359  
 360  
 361  
 362  
 363  
 364  
 365  
 366  
 367  
 368  
 369  
 370  
 371  
 372  
 373  
 374  
 375  
 376  
 377  
 378  
 379  
 380  
 381  
 382  
 383  
 384  
 385  
 386  
 387  
 388  
 389  
 390  
 391  
 392  
 393  
 394  
 395  
 396  
 397  
 398  
 399  
 400  
 401  
 402  
 403  
 404  
 405  
 406  
 407  
 408  
 409  
 410  
 411  
 412  
 413  
 414  
 415  
 416  
 417  
 418  
 419  
 420  
 421  
 422  
 423  
 424  
 425  
 426  
 427  
 428  
 429  
 430  
 431  
 432  
 433  
 434  
 435  
 436  
 437  
 438  
 439  
 440  
 441  
 442  
 443  
 444  
 445  
 446  
 447  
 448  
 449  
 450  
 451  
 452  
 453  
 454  
 455  
 456  
 457  
 458  
 459  
 460  
 461  
 462  
 463  
 464  
 465  
 466  
 467  
 468  
 469  
 470  
 471  
 472  
 473  
 474  
 475  
 476  
 477  
 478  
 479  
 480  
 481  
 482  
 483  
 484  
 485  
 486  
 487  
 488  
 489  
 490  
 491  
 492  
 493  
 494  
 495  
 496  
 497  
 498  
 499  
 500  
 501  
 502  
 503  
 504  
 505  
 506  
 507  
 508  
 509  
 510  
 511  
 512  
 513  
 514  
 515  
 516  
 517  
 518  
 519  
 520  
 521  
 522  
 523  
 524  
 525  
 526  
 527  
 528  
 529  
 530  
 531  
 532  
 533  
 534  
 535  
 536  
 537  
 538  
 539  
 540  
 541  
 542  
 543  
 544  
 545  
 546  
 547  
 548  
 549  
 550  
 551  
 552  
 553  
 554  
 555  
 556  
 557  
 558  
 559  
 560  
 561  
 562  
 563  
 564  
 565  
 566  
 567  
 568  
 569  
 570  
 571  
 572  
 573  
 574  
 575  
 576  
 577  
 578  
 579  
 580  
 581  
 582  
 583  
 584  
 585  
 586  
 587  
 588  
 589  
 590  
 591  
 592  
 593  
 594  
 595  
 596  
 597  
 598  
 599  
 600  
 601  
 602  
 603  
 604  
 605  
 606  
 607  
 608  
 609  
 610  
 611  
 612  
 613  
 614  
 615  
 616  
 617  
 618  
 619  
 620  
 621  
 622  
 623  
 624  
 625  
 626  
 627  
 628  
 629  
 630  
 631  
 632  
 633  
 634  
 635  
 636  
 637  
 638  
 639  
 640  
 641  
 642  
 643  
 644  
 645  
 646  
 647  
 648  
 649  
 650  
 651  
 652  
 653  
 654  
 655  
 656  
 657  
 658  
 659  
 660  
 661  
 662  
 663  
 664  
 665  
 666  
 667  
 668  
 669  
 670  
 671  
 672  
 673  
 674  
 675  
 676  
 677  
 678  
 679  
 680  
 681  
 682  
 683  
 684  
 685  
 686  
 687  
 688  
 689  
 690  
 691  
 692  
 693  
 694  
 695  
 696  
 697  
 698  
 699  
 700  
 701  
 702  
 703  
 704  
 705  
 706  
 707  
 708  
 709  
 710  
 711  
 712  
 713  
 714  
 715  
 716  
 717  
 718  
 719  
 720  
 721  
 722  
 723  
 724  
 725  
 726  
 727  
 728  
 729  
 730  
 731  
 732  
 733  
 734  
 735  
 736  
 737  
 738  
 739  
 740  
 741  
 742  
 743  
 744  
 745  
 746  
 747  
 748  
 749  
 750  
 751  
 752  
 753  
 754  
 755  
 756  
 757  
 758  
 759  
 760  
 761  
 762  
 763  
 764  
 765  
 766  
 767  
 768  
 769  
 770  
 771  
 772  
 773  
 774  
 775  
 776  
 777  
 778  
 779  
 780  
 781  
 782  
 783  
 784  
 785  
 786  
 787  
 788  
 789  
 790  
 791  
 792  
 793  
 794  
 795  
 796  
 797  
 798  
 799  
 800  
 801  
 802  
 803  
 804  
 805  
 806  
 807  
 808  
 809  
 810  
 811  
 812  
 813  
 814  
 815  
 816  
 817  
 818  
 819  
 820  
 821  
 822  
 823  
 824  
 825  
 826  
 827  
 828  
 829  
 830  
 831  
 832  
 833  
 834  
 835  
 836  
 837  
 838  
 839  
 840  
 841  
 842  
 843  
 844  
 845  
 846  
 847  
 848  
 849  
 850  
 851  
 852  
 853  
 854  
 855  
 856  
 857  
 858  
 859  
 860  
 861  
 862  
 863  
 864  
 865  
 866  
 867  
 868  
 869  
 870  
 871  
 872  
 873  
 874  
 875  
 876  
 877  
 878  
 879  
 880  
 881  
 882  
 883  
 884  
 885  
 886  
 887  
 888  
 889  
 890  
 891  
 892  
 893  
 894  
 895  
 896  
 897  
 898  
 899  
 900  
 901  
 902  
 903  
 904  
 905  
 906  
 907  
 908  
 909  
 910  
 911  
 912  
 913  
 914  
 915  
 916  
 917  
 918  
 919  
 920  
 921  
 922  
 923  
 924  
 925  
 926  
 927  
 928  
 929  
 930  
 931  
 932  
 933  
 934  
 935  
 936  
 937  
 938  
 939  
 940  
 941  
 942  
 943  
 944  
 945  
 946  
 947  
 948  
 949  
 950  
 951  
 952  
 953  
 954  
 955  
 956  
 957  
 958  
 959  
 960  
 961  
 962  
 963  
 964  
 965  
 966  
 967  
 968  
 969  
 970  
 971  
 972  
 973  
 974  
 975  
 976  
 977  
 978  
 979  
 980  
 981  
 982  
 983  
 984  
 985  
 986  
 987  
 988  
 989  
 990  
 991  
 992  
 993  
 994  
 995  
 996  
 997  
 998  
 999  
 1000  
 1001  
 1002  
 1003  
 1004  
 1005  
 1006  
 1007  
 1008  
 1009  
 1010  
 1011  
 1012  
 1013  
 1014  
 1015  
 1016  
 1017  
 1018  
 1019  
 1020  
 1021  
 1022  
 1023  
 1024  
 1025  
 1026  
 1027  
 1028  
 1029  
 1030  
 1031  
 1032  
 1033  
 1034  
 1035  
 1036  
 1037  
 1038  
 1039  
 1040  
 1041  
 1042  
 1043  
 1044  
 1045  
 1046  
 1047  
 1048  
 1049  
 1050  
 1051  
 1052  
 1053  
 1054  
 1055  
 1056  
 1057  
 1058  
 1059  
 1060  
 1061  
 1062  
 1063  
 1064  
 1065  
 1066  
 1067  
 1068  
 1069  
 1070  
 1071  
 1072  
 1073  
 1074  
 1075  
 1076  
 1077  
 1078  
 1079  
 1080  
 1081  
 1082  
 1083  
 1084  
 1085  
 1086  
 1087  
 1088  
 1089  
 1090  
 1091  
 1092  
 1093  
 1094  
 1095  
 1096  
 1097  
 1098  
 1099  
 1100  
 1101  
 1102  
 1103  
 1104  
 1105  
 1106  
 1107  
 1108  
 1109  
 1110  
 1111  
 1112  
 1113  
 1114  
 1115  
 1116  
 1117  
 1118  
 1119  
 1120  
 1121  
 1122  
 1123  
 1124  
 1125  
 1126  
 1127  
 1128  
 1129  
 1130  
 1131  
 1132  
 1133  
 1134  
 1135  
 1136  
 1137  
 1138  
 1139  
 1140  
 1141  
 1142  
 1143  
 1144  
 1145  
 1146  
 1147  
 1148  
 1149  
 1150  
 1151  
 1152  
 1153  
 1154  
 1155  
 1156  
 1157  
 1158  
 1159  
 1160  
 1161  
 1162  
 1163  
 1164  
 1165  
 1166  
 1167  
 1168  
 1169  
 1170  
 1171  
 1172  
 1173  
 1174  
 1175  
 1176  
 1177  
 1178  
 1179  
 1180  
 1181  
 1182  
 1183  
 1184  
 1185  
 1186  
 1187  
 1188  
 1189  
 1190  
 1191  
 1192  
 1193  
 1194  
 1195  
 1196  
 1197  
 1198  
 1199  
 1200  
 1201  
 1202  
 1203  
 1204  
 1205  
 1206  
 1207  
 1208  
 1209  
 1210  
 1211  
 1212  
 1213  
 1214  
 1215  
 1216  
 1217  
 1218  
 1219  
 1220  
 1221  
 1222  
 1223  
 1224  
 1225  
 1226  
 1227  
 1228  
 1229  
 1230  
 1231  
 1232  
 1233  
 1234  
 1235  
 1236  
 1237  
 1238  
 1239  
 12310  
 12311  
 12312  
 12313  
 12314  
 12315  
 12316  
 12317  
 12318  
 12319  
 12320  
 12321  
 12322  
 12323  
 12324  
 12325  
 12326  
 12327  
 12328  
 12329  
 12330  
 12331  
 12332  
 12333  
 12334  
 12335  
 12336  
 12337  
 12338  
 12339  
 12340  
 12341  
 12342  
 12343  
 12344  
 12345  
 12346  
 12347  
 12348  
 12349  
 12350  
 12351  
 12352  
 12353  
 12354  
 12355  
 12356  
 12357  
 12358  
 12359  
 12360  
 12361  
 12362  
 12363  
 12364  
 12365  
 12366  
 12367  
 12368  
 12369  
 12370  
 12371  
 12372  
 12373  
 12374  
 12375  
 12376  
 12377  
 12378  
 12379  
 12380  
 12381  
 12382  
 12383  
 12384  
 12385  
 12386  
 12387  
 12388  
 12389  
 12390  
 12391  
 12392  
 12393  
 12394  
 12395  
 12396  
 12397  
 12398  
 12399  
 123100  
 123101  
 123102  
 123103  
 123104  
 123105  
 123106  
 123107  
 123108  
 123109  
 123110  
 123111  
 123112  
 123113  
 123114  
 123115  
 123116  
 123117  
 123118  
 123119  
 123120  
 123121  
 123122  
 123123  
 123124  
 123125  
 123126  
 123127  
 123128  
 123129  
 123130  
 123131  
 123132  
 123133  
 123134  
 123135  
 123136  
 123137  
 123138  
 123139  
 123140  
 123141  
 123142  
 123143  
 123144  
 123145  
 123146  
 123147  
 123148  
 123149  
 123150  
 123151  
 123152  
 123153  
 123154  
 123155  
 123156  
 123157  
 123158  
 123159  
 123160  
 123161  
 123162  
 123163  
 123164  
 123165  
 123166  
 123167  
 123168  
 123169  
 123170  
 123171  
 123172  
 123173  
 123174  
 123175  
 123176  
 123177  
 123178  
 123179  
 123180  
 123181  
 123182  
 123183  
 123184  
 123185  
 123186  
 123187  
 123188  
 123189  
 123190  
 123191  
 123192  
 123193  
 123194  
 123195  
 123196  
 123197  
 123198  
 123199  
 123200  
 123201  
 123202  
 123203  
 123204  
 123205<br